United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 19,112

Wesley Barrett, Jr., Appellant,

v.

United States of America, Appellee.

989

APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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STATEMENT OF QUESTIONS PRESENTED

1. On the hearing of appellant's motion to suppress evidence obtained through a search incident to his arrest without a warrant for disorderly conduct, did the trial court err in ruling that the lawfulness of appellant's arrest depended upon whether there was a "reasonable basis" or prima facie grounds therefor and not whether appellant had actually committed the misdemeanor for which he was apprehended?

2. In denying the defense's motion to suppress evidence, did the trial court err in holding that appellant's arrest without a warrant for disorderly conduct was lawful because loudly expressed profanity constitutes disorderly conduct even when it is not overheard or not capable of being overheard?

3. In denying the defense's motion to suppress evidence, did the trial court err in holding that appellant's arrest without a warrant for disorderly conduct was lawful where the defense was not permitted to establish that there in fact was no public to be disturbed by appellant's conduct?

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JURISDICTIONAL STATEMENT

Appellant was convicted, after a plea of not guilty, on all counts of an indictment charging two violations of 21 U.S.C. § 174 (unlawful importation of narcotics) and two violations of 26 U.S.C. § 4704(a) (possession of narcotics not in the original stamped package). On December 4, 1964, the District Court sentenced appellant to serve twenty months to five years imprisonment on each of two of the counts, and five years imprisonment on each of the remaining two counts, said sentences to run concurrently. On December 8, 1964, appellant moved for leave to appeal in forma pauperis. Leave was granted on December 10, 1964. On December 30, 1964, counsel for appellant was appointed by the court below to prosecute this appeal. The jurisdiction of this Court is founded upon 28 U.S.C. § 1291.

STATEMENT OF THE CASE[1]

During the daylight hours on Sunday, May 10, 1964, appellant and an acquaintance were engaged in an argument in an alley in front of a deserted garage approximately 50 feet from the sidewalk in the ten hundred block of L Street, Northwest, in the City of Washington, D. C. (Tr. T. 30; Tr. M. 5, 8). Officers William P. Bento and Granville C. Slack, members of the Metropolitan Police Department walking a beat in this neighborhood, stated they were attracted to the argument when they overheard the appellant and his acquaintance "cursing each other." (Tr. M. 8). The police officers approached the appellant, questioned him and his acquaintance briefly, and then arrested them both for disorderly conduct.[2] (Tr. M. 6). A search of appellant's person revealed an envelope containing 16 capsules (Tr. T. 41) which later were found to contain heroin.

1/ All facts material to this appeal appear in either the Transcript of Proceedings on the defense's Motion to Suppress, cited herein as "Tr. M.", or in the Official Transcript of Proceedings of the trial, cited herein as "Tr. T." Both transcripts are included in the record on appeal.

2/ With respect to the disorderly charge, appellant posted and forfeited collateral.

On the basis of the chemical analysis of the 16 capsules a warrant for appellant's arrest for a narcotics violation was issued, which warrant was executed in the District of Columbia on May 20, 1964. (Tr. T. 47-48). The ensuing search of appellant disclosed another envelope containing 30 gelatin capsules, 29 of which were later found also to contain heroin (Tr. T. 49, 51).[3/] Appellant subsequently was indicted on two counts of unlawfully importing narcotics and two counts of possession of narcotics not in the original stamped package.

On September 11, 1964, the defense moved to suppress the evidence obtained in the May 10th and May 20th searches of appellant's person, on the ground that, since the misdemeanor for which appellant had been apprehended had not in fact been committed, his initial arrest on May 10th had been unlawful. That motion, heard by District Court Judge Edward M. Curran, and a similar motion made at his subsequent trial before District Court Judge Alexander Holtzoff, were denied. According to the trial court, it was not material that the profanities

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3/ The Government concedes that if the May 10th arrest and search were unlawful, then the subsequent arrest and search on May 20th also were unlawful. (Tr. T. 17).

constituting the alleged disorderly conduct were not overheard or not even capable of being overheard, or that the appellant might not have actually been guilty of disorderly conduct (Tr. T. 73). Thus, testimony designed to establish the improbability of the public being disturbed was excluded by the court. (Tr. T. 33-34). The trial court ruled that the question to be determined was not whether appellant was in fact guilty of disorderly conduct, but only whether "[t]he officers saw a prima facie case" or "there was a reasonable basis for the arrest." (Tr. T. 73, 10-11).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fourth Amendment:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."

District of Columbia Code
Section 22-1121:

> "Disorderly conduct - Generally.
>
> "Whoever, with intent to provoke a breach of the peace, or under such circumstances such that a breach of the peace, may be occasioned thereby -

(1) acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others;

(2) congregates with others on a public street and refuses to move on when ordered by the police;

(3) shouts or makes a noise either outside or inside a building during the nighttime to the annoyance or disturbance of any considerable number of persons;

(4) interferes with any person in any place by jostling against such person or unnecessarily crowding him or by placing a hand in the proximity of such person's pocketbook, or handbag; or

(5) causes a disturbance in any streetcar, railroad car, omnibus, or other public conveyance, by running through it, climbing through windows or upon the seats, or otherwise annoying passengers or employees,

shall be fined not more than $250 or imprisoned not more than ninety days, or both."

District of Columbia Code
Section 4-140:

"Arrests without warrant.

"The several members of the police force shall have power and authority to immediately arrest, without warrant, and to take into custody any person who shall commit, or threaten or attempt to commit, in the presence of such member, or within his view, any breach of the peace or offense directly prohibited by Act of Congress . . . ."

STATEMENT OF POINTS

1. In determining whether appellant's arrest had been lawful, the trial court erred in ruling that the test to be applied was whether there was a "reasonable basis" or prima facie grounds for the apprehension, and not whether the misdemeanor for which appellant had been arrested was actually committed.

2. The trial court erred in holding that appellant's arrest for disorderly conduct was lawful because loudly expressed profanity, though not capable of being overheard, constitutes the misdemeanor for which appellant was apprehended.

3. The trial court erred in excluding testimony that may have established appellant's innocence of the alleged disorderly conduct.

SUMMARY OF ARGUMENT

I.

Evidence obtained in a search without a warrant is not admissible in a trial of the person from whom the evidence was seized unless the search was conducted incident to a lawful arrest. In the District of Columbia a misdemeanant may lawfully be arrested without a warrant

only if the misdemeanor is in fact committed within the presence of the arresting officer. "Probable cause" or "prima facie" grounds to arrest, or a "reasonable basis" for an arrest, are tests to be applied to determine the lawfulness of arrests only in cases involving apprehensions for felonies. Accordingly, the trial court erred in holding that, as long as there was a "reasonable basis" or "prima facie" grounds for his arrest, appellant's apprehension for disorderly conduct was lawful even though he may not have been guilty of the misdemeanor for which he was arrested.

II.

The loud use of profane or obscene language does not constitute disorderly conduct unless it is likely to breach the peace and it is shown to have annoyed, disturbed, interfered with, obstructed or offended others. Thus, the trial court erred in holding that appellant's loudly expressed profanity constituted disorderly conduct even though it was not overheard or not capable of being overheard.

III.

Since the lawfulness of appellant's arrest without a warrant for disorderly conduct depends upon whether in fact he committed the misdemeanor for which he was apprehended, and since loudly spoken profanity will constitute disorderly conduct only when it is likely to breach the peace and when it annoys, disturbs, interferes with, obstructs or offends others, testimony tending to show that at the time of the act there was no public present to be affected thereby is material to the question of the lawfulness of the arrest. Accordingly, the trial court erred in holding that appellant's apprehension was lawful where the defense was not permitted to establish that there was no public to be disturbed by appellant's conduct.

ARGUMENT

I. IN DETERMINING THE LAWFULNESS OF APPELLANT'S ARREST FOR DISORDERLY CONDUCT, THE DISTRICT COURT ERRED IN HOLDING THAT THERE NEED ONLY HAVE BEEN A "REASONABLE BASIS" FOR THE ARREST

A search conducted without a search warrant is invalid unless made incident to a lawful arrest. U. S. Const. amend. IV; Judd v. United States, 190 F.2d 649 (D.C. Cir. 1951). Moreover, evidence obtained as a result of such a search will not be admissible against a defendant if he is able to show that the arrest was not a valid one. See Trupiano v. United States, 334 U.S. 699, 707 (1948).

In overruling appellant's objection to the testimony concerning the heroin capsules on the ground that appellant's arrest and subsequent search were unlawful, the trial court held that the lawfulness of appellant's arrest for disorderly conduct - a misdemeanor - depended upon "whether there was a reasonable basis for the arrest, not whether the defendant was guilty of the charge for which he was arrested."[4/] If "[t]he officers

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4/ Tr. T. 10-11.

saw a prima facie case of a misdemeanor being committed in their presence," said the trial court, ". . . that is all that is necessary."[5/]

It is well established that the lawfulness of an arrest without a warrant is to be determined by reference to local law. Miller v. United States, 357 U.S. 301, 305-06 (1958). The District of Columbia Code provides that a misdemeanant may be arrested without a warrant only if he "shall commit, or threaten or attempt to commit," the offense in the presence or view of the arresting officer. Section 4-140, District of Columbia Code. See also Maghan v. Jerome, 67 App. D.C. 9, 10, 88 F.2d 1001, 1002 (1937); Stephens v. United States, 106 App. D.C. 249, 250 n. 1, 271 F.2d 832, 833 n. 1 (1959).

In construing Section 4-140 and in determining the lawfulness of an arrest without a warrant, a clear distinction has been drawn by this Court between the arrest of persons suspected of having committed felonies, and the apprehension of misdemeanants.

> "The District of Columbia follows the common law rule that a law officer may arrest without a warrant if (1) there is probable cause to believe that a

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5/ Id. at 73.

> felony has been committed and that the arrested person committed it, . . . or (2) if a misdemeanor has been committed in the presence of an arresting officer." Stephens v. United States, supra. See also Maghan v. Jerome, supra.

Thus, a finding that the arresting officers had "probable cause", or a "reasonable basis", or "prima facie" grounds, to make an arrest without a warrant will sustain the lawfulness of such arrest only if the apprehension was for a felony. In the case of misdemeanors, however, the offense must have been actually committed; and the mere belief, however reasonable, that a misdemeanor is being committed is not sufficient to constitute the arrest a lawful one.

This distinction has been acknowledged by the Supreme Court in an opinion written by Chief Justice Taft:

> "The usual rule is that a police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony, and that he may only arrest without a warrant one guilty of a misdemeanor if committed in his presence. Kurtz v. Moffit, 115 U.S. 487; Elk v. United States, 177 U.S. 529." [Emphasis added]. Carroll v. United States, 267 U.S. 132, 156-57 (1925).

And the distinction has been recognized by the courts of other jurisdictions in which similar arrest statutes

are in effect.[6/] E.g., Adair v. Williams, 24 Ariz. 422, 210 Pac. 853 (1922); People v. Perry, 180 P.2d 465, 467 (Calif. Sup. Ct. 1947); Robinson v. State, 197 Ind. 144, 149 N.E. 891, 892 (1925); State v. Small, 184 Iowa 882, 169 N.W. 116, 117 (1918); Bowman v. Commonwealth, 211 Ky. 118, 276 S.W. 1057, 1058 (1925); Robinson v. State, 229 Md. 503, 184 A.2d 814, 816-17 (1962); Hilla v. Jensen, 149 Minn. 58, 182 N.W. 902, 903 (1921); State v. Dunivan, 217 Mo. App. 548, 269 S.W. 415, 417 (1925); State v. Bradshaw, 53 Mont. 96, 161 Pac. 710, 711 (1916); Stearns v. Titus, 193 N.Y. 272, 85 N.E. 1077, 1078 (1908); Mitchell v. Hughes, 104 Wash. 231, 176 Pac. 26, 28 (1918). See also McGuire v. State, 19 Ala. App. 138, 95 So. 565 (1923).

The arrest of a misdemeanant on the "reasonable belief" of a police officer, and a subsequent search and seizure, will not, therefore, be found to have been lawful unless "it turns out that [the officer's] belief is correct." United States v. Stafford, 296 Fed. 702,

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6/ Compare United States v. Gaither, 209 F.Supp. 223, 224 (D. Del. 1962), where the court was applying a statute that required the arresting officer only to have a "reasonable ground to believe that the person to be arrested has committed a misdemeanor in his presence . . . ."

706 (E.D. Ky. 1923).

Despite the clarity of the foregoing authorities the trial court improperly applied to a misdemeanor arrest the standard for determining the lawfulness of a felony apprehension. Had the court instead applied the correct measure, it may well have concluded that the appellant's arrest and subsequent search were in violation of the Fourth Amendment of the United States Constitution.

II. IN DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE, THE TRIAL COURT ERRED IN HOLDING THAT PROFANITY LOUDLY EXPRESSED CONSTITUTES DISORDERLY CONDUCT EVEN THOUGH NOT OVERHEARD OR NOT CAPABLE OF BEING OVERHEARD

Under the District of Columbia Code, Section 22-1121, a person is guilty of disorderly conduct if he acts "in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others", and such acts are intended, or are reasonably likely, to provoke a breach of the peace.[7/] The statute unequivocally requires proof of not only a reasonably likely

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7/ Other acts constituting disorderly conduct are also set forth in D.C. Code § 22-1121, but they are not relevant here.

breach of the peace, but also the actual annoyance, disturbance, interference with, obstruction or offense to one or more members of the public. Thus, the use of profane and obscene language should certainly constitute disorderly conduct if it were established that the abusive language was capable of being overheard by someone whose interests the statute sought to protect. See, e.g., Heilman v. District of Columbia, 172 A.2d 141 (D.C. Mun. Ct. App. 1961); Morris v. District of Columbia, 31 A.2d 652 (D.C. Mun. Ct. App. 1943).

It is difficult to believe, however, that the use of profanity, even loudly spoken, can be held to constitute disorderly conduct, where the language used is not overheard or it is not even capable of being overheard. Heinze v. Murphy, 180 Md. 423, 24 A.2d 917, 920 (1942). Yet this is exactly what the trial court held.[8/] Without the actual or likely overhearing of the profanities uttered, neither of the statutory elements for disorderly conduct - a probable breach of the peace and the actual annoyance to the public - can possibly result from the alleged disorder. This ruling of the trial court was, therefore, error.

8/ Tr. T. 72, 73.

III. THE TRIAL COURT ERRED IN HOLDING THAT APPELLANT'S ARREST WAS LAWFUL WHERE TESTIMONY THAT MIGHT HAVE ESTABLISHED THAT APPELLANT DID NOT ACTUALLY COMMIT THE MISDEMEANOR CHARGED WAS ERRONEOUSLY EXCLUDED

In his cross-examination of the arresting police officers, trial defense counsel sought to establish that at the time of appellant's arrest there was no public whose peace might have been disturbed. This line of questioning was terminated by the court as being immaterial.[2/]

If appellant is correct in urging that the lawfulness of a misdemeanant's arrest depends upon whether in fact he committed the offense for which he was arrested, and if the offense of disorderly conduct is not committed unless the act complained of is likely

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2/ Tr. T. 33-34:

> "THE COURT: You mean that if a person disturbs the peace and there are no persons around, there is no disturbance of the peace, is that your contention?
>
> "MR. MILLER: If breach of the peace means breach of the public order, I contend there needs to be a public before there can be a breach.
>
> "THE COURT: I am going to overrule that contention."

to breach the peace and in fact annoys, disturbs or offends the public, then clearly testimony should be admitted if it may tend to show that the required results could not follow because in fact there was no public to react to the conduct. The trial court's ruling excluding this testimony and preventing appellant from going forward with his burden of proof was, therefore, error.

CONCLUSION

For the foregoing reasons the judgment of the court below should be reversed. The case should be remanded for a new hearing on appellant's motion to suppress, with directions either to reaffirm the judgment upon a finding that appellant was in fact guilty of disorderly conduct, or to hold a new trial if upon a hearing of the motion appellant is found to have been not guilty of that offense.

Respectfully submitted,

/s/ EDWARD S. COGEN
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Of Counsel:

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CERTIFICATE OF SERVICE

I certify that I have this 8th day of March, 1965, served a true copy of the foregoing Brief for Appellant by mailing it, properly addressed, postage prepaid, to:

David C. Acheson, Esq.
United States Attorney
United States Court House
Washington 25, D. C.

Edward S. Cogen
Attorney for Appellant

BRIEF FOR APPELLEE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 19,112

WESLEY BARRETT, JR., Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
JOEL D. BLACKWELL,
GERALD E. GILBERT,
Assistant United States Attorneys.

QUESTION PRESENTED

In the opinion of the appellee, the following question is presented:

Was appellant lawfully arrested for disorderly conduct when two policemen walking along 11th Street Northwest at about 6 p.m. on May 11 heard appellant and another man arguing and swearing loudly about fifty feet away down an alley, and where appellant spoke additional profane and obscene words when questioned by the officers?

I N D E X

TABLE OF CASES

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,112
(Cr. No. 583-64)

WESLEY BARRETT, JR., Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

MOTION TO AFFIRM OR DISMISS OR, IN THE ALTERNATIVE, THAT THE INSTANT MOTION BE CONSIDERED AS APPELLEE'S BRIEF

Comes now the appellee by its attorney, the United States Attorney, and moves the Court that the instant appeal be dismissed as frivolous or that the judgment of the District Court be summarily affirmed. In the alternative, appellee moves that the instant motion be considered as appellee's brief. In the event the instant motion be denied, appellee moves for an extension of 10 days from the entry of the order of denial within which to file appellee's brief.

A four-count indictment filed June 29, 1964 charged appellant with violations of narcotic laws 21 U.S.C. § 174 and 26 U.S.C. § 4704(a). Appellant waived trial by jury and was tried by the court on October 28, 1964. He was found guilty of all charges. By judgment and commitment filed December 7, 1964 appellant was sentenced to twenty (20) months to five (5) years on two counts, and five (5) years on the other two counts, sentences to run concurrently and those sentences to run concurrently with a sentence he was already serving. Appellant now appeals, in forma pauperis, from that judgment.

This case involved two different arrests of the appellant and at the time of each arrest narcotics were found in his possession. Prior to trial appellant moved to suppress the narcotics taken during both arrests. A hearing was held before the Honorable Edward M. Curran and the motion was denied. Appellant renewed his motion to suppress at trial and the motion was again denied. Appellant raises three points on appeal, all relating to the denials of his motion to suppress.

The Government's evidence at the pre-trial hearing and also at trial was overwhelming in showing that the seizures of narcotics from appellant were incident to lawful arrests. Appellant's contentions now on appeal are frivolous. On Sunday evening of May 10, 1964, Officer Slack and Bento were patrolling their foot beat in the District of Columbia (1 Tr. 4, 2 Tr. 22, 38)[1/]. They were walking in the 1100 block of 11th Street, Northwest, when they observed the appellant and another man standing in an alley which runs behind the Soldiers' and Sailors' Club next to an apartment building and perpendicular to 11th Street. Appellant and his companion, who were about fifty feet from the officers, were arguing and swearing loudly at each other. The officers could hear them from the street. There were also other people walking on 11th Street, some of whom stopped, apparently to see what was happening. As a result of this arguing and loud swearing the officers approached appellant and the other man. Officer Slack asked the appellant what he was arguing about, and appellant replied something to the effect that "It is none of your Goddam business."

1/ "1 Tr." refers to the transcript of the pre-trial hearing, and "2 Tr." refers to the transcript of the trial.

Appellant also said something to the effect that "This no good M.F. borrowed some money off me and won't pay me," and the other man said "You no good son of a bitch, I did." The officers arrested both men for disorderly conduct (1 Tr. 6-8, 2 Tr. 24, 30-31, 39-41, 43).

Officer Slack searched the appellant at the scene incident to the arrest and found an envelope containing capsules of narcotics in appellant's possession (1 Tr. 7, 9, 24, 28, 2 Tr. 26-27, 41-42). The officers escorted appellant and his companion to the police station. Appellant and the other man were booked for disorderly conduct (1 Tr. 10, 2 Tr. 27-28, 41-42). Appellant forfeited ten dollars on the disorderly conduct charge and was released (1 Tr. 13-14, 17, 25, 29, 2 Tr. 27-28, 42, 46).

Officer Slack gave the narcotics he took from appellant to his partner, Officer Bento, who in turn gave them to Officer Bush of the narcotics squad. Officer Slack then obtained a warrant for appellant based upon the narcotics he had seized from the appellant. (1 Tr. 13, 2 Tr. 42). The warrant was executed by Officer Bush. At the time of that arrest, Detective Somerville, Officer Bush's partner, searched the appellant in Bush's presence, and found about 29 more capsules of narcotics in appellant's possession (1 Tr. 17-20, 2 Tr. 48-52).

Neither the narcotics seized from the appellant at the time of his arrest for disorderly conduct, nor the narcotics seized at the time of his arrest under the warrant, were in a package with any kind of stamps on it at the time they were seized (2 Tr. 61-62). It was also established that the capsules seized from appellant incident to both arrests did in fact contain narcotics (2 Tr. 53-58).

Appellant's basic theory of his contentions on appeal is that his arrest for disorderly conduct was improper. But just a glance at the facts and the Disorderly Conduct statute in the District of Columbia quickly dispels that theory. Title 22 D.C. Code § 1107, provides:

> [I]t shall not be lawful for any person or persons to curse, swear, or make use of any profane language or indecent or obscene words, or engage in any disorderly conduct in any street, avenue, alley, road, highway, public park or inclosure, public building . . . , or in any place wherefrom the same may be heard in any street, avenue, alley, road, highway, . . . under a penalty of not more than $250 or imprisonment for not more than 90 days, or both for each and every such offense.

Clearly, appellant's conduct of arguing and loud swearing in the alley in this case was a violation of the above cited disorderly conduct statute. Appellant's argument that a breach of the peace was not shown is untenable and immaterial. A reasonable view of the facts shows definitely that there was a breach of the peace, but since a breach of the peace is not required to prove disorderly conduct, it makes no difference whether such a breach was shown. Stovall v. United States, 202 A.2d 390 (D.C. Ct. App. 1964); Morris v. District of Columbia, 31 A.2d 652 (D.C. Mun. Ct. App. 1943). Furthermore, aside from the fact that appellant forfeited ten dollars on the disorderly charge for which he was arrested, the specific charge that is eventually

placed against a defendant, and whether he is tried and convicted, are issues not relevant to the validity of a defendant's arrest. Payne v. United States, 111 U.S. App. D.C. 94, 294 F.2d 723 (1961); Bell v. United States, 102 U.S. App. D.C. 383, 254 F.2d 82 (1958).

Appellant committed a misdemeanor in the presence of a police officer. The officer had authority to arrest the appellant, Title 4 D.C. Code § 140, and the officer would himself have been guilty of a misdemeanor had he failed to arrest appellant in these circumstances. Title 4 D.C. Code § 143. The search of appellant which revealed the narcotics was incident to a lawful arrest, and appellant's motion to suppress was properly denied. Hutcherson v. United States, __U.S. App. D.C.__,__F.2d ____(No. 18,375, decided March 18, 1965).

By isolating certain portions of the record appellant's presentation of the facts implies that the trial court failed to consider the validity of appellant's arrest in light of whether appellant committed a misdemeanor in the presence of the police officer. Of course appellant's motion to suppress had already been denied after a hearing before a different judge. Nevertheless, those portions of the record which were omitted from appellant's version of what occurred at trial reveal that the trial court very carefully, and properly, considered the issue of whether appellant committed a misdemeanor in the presence of the arresting officer. For example, the following

colloquy took place between the trial court and defense counsel:

> MR. MILLER (defense counsel): The standard, I believe, for arrests in the case of a misdemeanor is that the officer see the offense committed in his presence.
>
> THE COURT: Yes, see or hear. In other words, they must perceive it with one of their five senses.
>
> MR. MILLER: Yes, the officers must perceive the offense, rather than for example be told by somebody else.
>
> THE COURT: That is correct. (2 Tr. 11).

WHEREFORE, it is respectfully submitted that the judgment of the District Court be summarily affirmed or that the appeal be dismissed. In the event that this motion be denied, appellee moves for an extension of 10 days within which to file its brief.

/s/ DAVID C. ACHESON
DAVID C. ACHESON
United States Attorney

/s/ FRANK Q. NEBEKER
FRANK Q. NEBEKER
Assistant United States Attorney

/s/ JOEL D. BLACKWELL
JOEL D. BLACKWELL
Assistant United States Attorney

/s/ GERALD E. GILBERT
GERALD E. GILBERT
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion has been mailed to attorney for the appellant, Edward S. Cogen, Esquire, 701 Union Trust Building, Washington, D. C., 20005, this 2nd day of April, 1965.

/s/ GERALD E. GILBERT,
GERALD E. GILBERT,
Assistant United States Attorney

REPLY BRIEF FOR APPELLANT

IN THE
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No. 19,112

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IN THE
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v.

UNITED STATES OF AMERICA,

Appellee.

OPPOSITION TO APPELLEE'S MOTION TO AFFIRM
OR DISMISS OR, IN THE ALTERNATIVE, FOR AN
EXTENSION OF TIME WITHIN WHICH TO FILE A BRIEF

Appellant, by his Court-appointed attorney, opposes appellee's motion to affirm summarily the judgment of the District Court, or to dismiss the appeal, or in the alternative for an extension of time within which to file appellee's brief.[1/] As a ground therefor appellant urges that the issues raised in his appeal are meritorious and not frivolous. Further, appellant urges:

1/ In the event this Court grants the government's additional request to have appellee's Motion considered as its brief, appellant respectfully requests that his Opposition be treated as his Reply Brief thereto.

I. Appellee's Suggestion That Appellant Was Apprehended for Violating Section 22-1107 of the District of Columbia Code Is Not Supported By the Record.

Defendant was arrested on May 10, 1964, for "disorderly conduct." See, e. g., Tr. T. 24, 41; Tr. M. 6. The records of the police precinct in which he was apprehended, and the records of other interested administrative and judicial departments, reflect also that appellant was apprehended only for "disorderly conduct."

Appellee's motion suggests that appellant's conduct on May 10th should fall within the proscriptions of 22 D. C. Code § 1107. But the pretrial hearing on appellant's motion to suppress (Tr. M. 32-33) and the trial before the District Court (Tr. T. 65-67) proceeded clearly on the theory, with no indication to the contrary by the Court or the United States Attorney, that appellant's arrest had been founded upon an alleged violation of 22 D. C. Code § 1121. What is more, section 22-1121 is entitled "Disorderly conduct - Generally", while the title of section 22-1107 is "Unlawful assembly - Profane and indecent language." Accordingly, section 22-1107 is not, as appellee states, "the Disorderly Conduct statute in the District of Columbia" under which appellant was arrested.

Appellee's eleventh-hour reliance upon section 1107 of Title 22 is, therefore, misplaced, and raises serious constitutional questions of reasonable notice and due process of law. See Cole v. Arkansas, 333 U.S. 196 (1948).

II. Appellant's Forfeiture of Collateral on the Disorderly Charge Is Not Dispositive of the Question Whether His Arrest Was Lawful.

Appellee hints that appellant's election to forfeit ten dollars collateral rather than appear on the disorderly conduct charge might carry weight in deciding whether his arrest for that misdemeanor was lawful. But in no sense could it be said that the disorderly charge was adjudicated, or that the issues therein are res judicata, or that a judgment thereon had been entered against defendant. The forfeiture of a recognizance is nothing more than an election by a person not to suffer the inconveniences of appearing in court on a minor offense. Cf. United States v. Schneiderman, 102 F. Supp. 52, 56 (S.D. Calif. 1951). It is not an admission - or a determination - of guilt of the misdemeanor charged.

III. Appellee's Motion for an Extension of Time Within Which to File a Brief Should Be Denied.

On March 8, 1965, and within the time limits prescribed, appellant filed his brief with this Court. Twenty-five days thereafter, appellee moves this Court summarily to affirm the judgment of the District Court or to dismiss the appeal or, in the alternative, requests an extension of ten days within which to file its brief.

Rule 18(b) of the Rules of this Court plainly requires an appellee to file his brief "within 25 days after the filing of the brief for appellant." Where an extension of time is desired, and such extension "may delay the hearing", a motion requesting such extension "must be filed not less than 10 days before the brief is due to be filed . . . ." Rule 18(f), U. S. Appeals D. C. Rules.

Appellee's request for an extension at this late date is a transparent attempt to avoid the strictures of this Court's own rules. No explanation is given for appellee's failure timely to file its brief, nor is the requisite justification or statement of "extraordinary

reasons" offered for requesting the additional time to file. Rule 18(g), U. S. Appeals D. C. Rules.

WHEREFORE, appellant respectfully submits that appellee's motion to affirm summarily the judgment of the District Court, or to dismiss the appeal, or in the alternative for an extension of time within which to file a brief, should be denied.

/s/ Edward S. Cogen
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CERTIFICATE OF SERVICE

I certify that I have this 9th day of April, 1965, served a true copy of the foregoing Opposition by mailing it, postage prepaid, to Gerald E. Gilbert, Esq., Assistant United States Attorney, United States Court House, Washington 25, D. C.

/s/ Edward S. Cogen
EDWARD S. COGEN
Attorney for Appellant